(2)

No. 90-988

In The

Supreme Court of the United States

October Term, 1990

NICHOLAS P. MANOCCHIO,

Petitioner,

vs.

JOHN MORAN, DIRECTOR, DEPARTMENT OF CORRECTIONS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER UNAVAILABILITY OF A HEARSAY DECLARANT IS A CONSTITUTIONAL PREREQUISITE TO ADMISSION OF HEARSAY EVIDENCE OVER A CONFRONTATION CLAUSE EXCEPTION.

II. WHETHER THE STATE WAS UNDER ANY DUTY TO PRODUCE OR DEPOSE AN ABSENT FORENSIC PATHOLOGIST WHO PERFORMED POST-MORTEM EXAMINATION AND RECORDED HIS FINDINGS IN AN AUTOPSY REPORT, BUT DID NOT EXAMINE THE INTERNAL BRAIN, IN ORDER TO SATISFY A CONFRONTATION CLAUSE CHALLENGE TO ADMISSION OF THE REPORT, WHERE A MORE EXPERIENCED, HIGHER-RANKED, STATE MEDICAL EXAMINER WHO PARTICIPATED IN THE CONFERENCE ON THE FORMALIN-FIXED BRAIN, CONCURRED IN JOINT CONCLUSIONS ON THE CAUSE OF DEATH, AND SIGNED THE AUTOPSY REPORT ALSO, WAS PRESENT AND WOULD HAVE TESTIFIED TO THE CAUSE OF DEATH, HAD NOT ONE OR MORE DEFENDANTS OBJECTED.

III. WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT OBSERVATIONS STATED IN THE AUTOPSY REPORT AS TO THE CONDITION OF THE CORPSE CONTAINED SUFFICIENT PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS TO SUPPORT THEIR ADMISSION IN A HOMICIDE PROSECUTION OVER A CONFRONTATION CLAUSE OBJECTION, WITHOUT THE PRESENCE OF THE EXAMINER WHO PREPARED THE REPORT.

IV. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT ADMISSION OF THE AUTOPSY REPORT WITHOUT REDACTING A PORTION REPEATING INFORMATION CONTAINED IN A POLICE REPORT, NAMELY, THAT DECEDENT

QUESTIONS PRESENTED-Continued

HAD BEEN BEATEN IN A PARKING LOT APPROXIMATELY ONE HOUR BEFORE HE DIED, DID NOT VIOLATE CONFRONTATION-CLAUSE RIGHTS OF THIS DEFENDANT, NOT LINKED TO THE BEATING IN THE REPORT, WHO DID NOT DENY THAT A BEATING OCCURRED BUT MERELY ARGUED THAT DEATH RESULTED FROM SOME OTHER CAUSE.

V. WHETHER THE CONSTITUTIONAL RIGHT OF AN ACCUSED TO CONFRONT ADVERSE EVIDENCE WAS ADEQUATELY PRESERVED IN THE CIRCUMSTANCES OF THIS PARTICULAR TRIAL.

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CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, *Manocchio v. Moran*, 919 F.2d 770 (1st Cir. 1990). The opinion of the United States District Court for the District of Rhode Island, *Manocchio v. Moran*, 708 F. Supp. 473 (D.R.I. 1989). The opinion of the Supreme Court of Rhode Island, *State v. Manocchio*, 497 A.2d 1 (R.I. 1985).

JURISDICTION

Petitioner sought federal habeas corpus relief from his state conviction under 28 U.S.C. § 2254. The United States District Court for the District of Rhode Island granted his petition and ordered the State of Rhode Island to commence a new trial within 90 days or suffer the writ to issue. The State appealed from that Order to the United States Court of Appeals for the First Circuit. The First Circuit reversed. Petitioner seeks review of that reversal by writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the federal Constitution:

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by

> an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. XIV, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws.

STATEMENT OF THE CASE

The question in this case is whether the Confrontation Clause is offended by admission of an autopsy report in a state homicide prosecution in absence of testimony by the person who performed the autopsy. The pathologist in this case was Dr. Joel Zirkin, an associate state medical examiner on a two-year appointment, who moved to Israel after his term expired. He conducted postmortem examination and dissection of the victim, but did not perform the gross and microscopic examinations of the formalin-fixed brain, through which the cause of death was established. These were done by a consulting neuropathologist, Dr. Mary Ambler, in a conference

attended by the full staff, including Zirkin and his two superiors, William Q. Sturner, the Chief Medical Examiner, and Arthur Burns, the Deputy Chief, all of whom participated. (Tr. 1987) Dr. Ambler submitted written findings which were largely incorporated in the autopsy report, prepared by Zirkin and signed by all three medical examiners, stating their collective conclusion that the victim had died of multiple injuries after a beating and that the manner of death was homicide. The Deputy Chief Examiner was a witness at trial.

Petitioner now characterizes this as a " 'trial by affidavit' " from whose " 'evil' " he would have been protected, Petition at 3, had the absent examiner been deposed or produced at trial. That is not the case. The cause of death was not determined by Dr. Zirkin alone, from his external and internal examination of the body at autopsy; this was jointly determined by the full staff after consultation with the neuropathologist. Zirkin was the least experienced member of the staff, moreover; his testimony could not have added anything that Dr. Burns, the Deputy Chief, could not have provided with greater expertise.

Expertise was not what the defense desired in this case, however. Though petitioner now represents to this Court that the cause of death was "a legitimately disputed issue" below, Petition at 3, he had moved before trial to exclude not only the autopsy report and "any and all hospital, medical," or other reports "ostensibly probative of any medical opinion of the cause of the victim's death" from evidence, but also, "the testimony of any medical examiner, associate medical examiner, physician, pathologist, or any medical professional person regarding

the cause of death of the victim, including but not limited to" the Chief and the Deputy Chief Medical Examiners. (Tr. 1908) Similarly, though petitioner now excoriates the prosecutor for having failed to depose the former associate medical examiner before the witness left the country, Petition at 10-11, he fails to mention that two of his codefendants told the trial court they had opposed the State's motion to take the deposition. (Tr. 1918-19) Petitioner's assertion now that his "objection to the use of documentary evidence in preference to live testimony was not an obstructionist effort", Petition at 3, is belied by the record.

The First Circuit conducted a careful and painstaking review of the confrontation analysis of the hearsay evidence addressed in *Ohio v. Roberts*, 448 U.S. 56 (1980), and *United States v. Inadi*, 475 U.S. 387 (1986), and found the reasoning of the latter "applies equally well to distinguish the former testimony of *Roberts* from most of the other hearsay exceptions, such as – for example – business records or public records." *Id.* at 774. The circuit court noted that "While an autopsy report, strictly speaking, does not fall within the category of a clearly recognized hearsay exception," it "shares most of the features of both the business records and the public records exceptions" codified in Rules 803(6) and (8) of the Rules of Evidence, "and the reasoning of *Inadi* similarly applies." *Id.* As it recognized, the Supreme Court of Rhode Island also found autopsy reports admissible as a business or public record under state evidence law, *id.* at 776-77 (citing *Manocchio*, 497 A.2d at 6). The court found no real benefit to be gained from live testimony of the pathologist, because "If any length of time has passed since the

performance of the autopsy, the medical examiner will probably not remember the autopsy and its results independently from the report itself." *Id.* at 775. Moreover, "detailed descriptions" of the body "and often his judgments will be superior at the time he writes the report to any he could make later; he will ordinarily be able to testify only by reference to the report." *Id.* "Further," the court said, "the routine, standardized conditions under which such reports are prepared, as well as the fact that the medical examiner is exercising a special responsibility which the law assigns to him, *assure their independent reliability.*" *Id.* [emphasis added]. The court therefore held that the autopsy report in this case "possessed sufficient 'particularized guarantees of trustworthiness' that its admission in the absence of live testimony by its preparer did not offend the Confrontation Clause." *Id.* at 777. It emphasized factors underlying that conclusion, however, *id.*, and then went on to identify and to examine in detail the four distinct kinds of hearsay admitted in the report: (1) descriptive observations of the condition of the corpse; (2) medical opinions as to the nature of any injuries or illnesses, and conclusions as to the medical cause of death, based on those opinions; (3) statements as to the circumstances surrounding the death, taken from police reports or other sources; and (4) the conclusion that the manner of death was homicide. *Id.* at 778-784.

FACTUAL BACKGROUND

In the late evening of November 1, 1980, Richard Fournier and Maureen Enright went to Gantry's nightclub on Mineral Spring Avenue in North Providence,

Rhode Island, to hear the band known as "Love Lace," for whom Fournier had once worked.

Also at the club that evening were five men, later identified as Nicholas Manocchio [Petitioner here]; his brother, Louis Manocchio; Paul Eacuello; his brother, Stephen Eacuello; and James Massarone. Witnesses were able to describe one or more of these men as having attracted their notice for various reasons that evening. *See State v. Manocchio*, 497 A.2d 1, 3-4, 9-10 (R.I. 1985); *see also Record* at 751, 946, 1217, 1226, 1234, 1279, 1594-98, 1626-29, 1633-34, 1715. One of the men had a cast on his arm. (Tr. 935-37, 970, 1226, 1594, 1628) The one with the cast identified himself as "Nicky" (Tr. 1101) and came back to the dressing room looking for Fournier (Tr. 1224) on the pretext of booking the band. (Tr. 937, 1224) This man told Maureen Enright, " 'Your boyfriend's as good as dead.' " (Tr. 981-82)

Marguerite Fournier, the victim's mother, testified that for approximately two weeks before that night she had been receiving telephone calls and visits from a man identifying himself as Stephen Eacuello, who said he was looking for her son, Richard. Eacuello called on October 26 and told her to tell Rick not to leave: " 'We have to see him.' " (Tr. 427-30) That same evening, Eacuello and two other men came to her house. One was James Massarone. (Tr. 439-41) The third man was obnoxious; he told Mrs. Fournier her son owed them each a thousand dollars and there would be " 'problems' " if they didn't get to see him. (Tr. 433-35) Eacuello came to the house again October 27th. On the 30th, he called and said, " 'We are sorry for the problem we have caused you, but it's out of my hands now.' " (Tr. 437-38) Mrs. Fournier testified that the

last time she saw her son, he was in very good health. (Tr. 443)

Jayne Leo and Bruce Martin were leaving Gantry's around one o'clock that morning when Jayne saw four men fighting outside in the parking lot, "screaming, hollering, kicking and hitting" as "the person they were beating on" was yelling, " 'Help me, help me, someone, please, help me. Let me explain. I can explain the whole thing.' " *State v. Manocchio*, 497 A.2d at 4. The struggling group progressed to the rear of a car and the victim fell to the ground, eventually crawling underneath the car and clinging to the axle in effort to avoid the constant kicking of his attackers as he cried for help. *Id.* At some point Jayne saw the "big person" she had noticed inside the club walk to the back of the lot and get into a pale yellow Cadillac. He brought the car around, and opened the passenger door. The assailants tried to pull Fournier out from under the other car, telling him, " 'Get in this car. You'll make it a lot easier on yourself. Just get in this car.' " *Id.* Jayne was still watching as she pulled her own car out of the lot and then drove up the street to where Bruce Martin was parked. (Tr. 1715-1727)

The band was playing the last set when Charlene O'Brien, lead singer for the band, ran onto the stage and tried to enlist help. (Tr. 939, 1630) Fournier was lying on his back in the parking lot, bleeding. His pants had been torn off his body and he was naked from the waist down. (Tr. 985, 1770-72) A boot was retrieved from the gutter the next day; the pants were found a quarter of a mile further down the road. (Tr. 1846-48) Mrs. Fournier identified these as having belonged to her son. (Tr. 444)

Robert Marcoux, a bartender at Gantry's, had been a combat medic in Vietnam and went out to try to administer first aid until the rescue squad arrived. He found Fournier bleeding profusely and apparently in shock, his throat full of blood. Marcoux gave him mouth-to-mouth resuscitation until the rescue squad arrived and conveyed Fournier to Roger Williams General Hospital in Providence (Tr. 1226-29). He died within the hour.

Petitioner and his four codefendants were indicted three months later for murder and conspiracy to murder, and the case came to trial in September 1982. Petitioner, his brother, and Paul Eacuello were each convicted of the lesser offenses of voluntary manslaughter and conspiracy to commit assault and battery with a dangerous weapon. The jury was unable to reach a verdict with respect to the other two defendants, and a mistrial was declared as to each of them. Defendants' direct appeal was denied by the Supreme Court of Rhode Island in 1985 and the convictions were all affirmed. *State v. Manocchio*, 497 A.2d 1. Petitioner successfully petitioned the United States District Court for habeas relief under 28 U.S.C. § 2254, *Manocchio v. Moran*, 708 F. Supp. 473 (D.R.I. 1989), but that decision was reversed on appeal, *Manacchio v. Moran*, 919 F.2d 770 (1st Cir. 1990). Petitioner now seeks review by writ of certiorari to the Court of Appeals for the First Circuit.

ARGUMENT

I. THE FIRST CIRCUIT CORRECTLY DECIDED THAT THE NATURE AND PURPOSES OF THE BUSINESS-RECORDS AND PUBLIC-RECORDS EXCEPTIONS TO THE HEARSAY RULE MAKE A SHOWING OF THE UNAVAILABILITY OF THE DECLARANT CONSTITUTIONALLY UNNECESSARY.

Petitioner attacks the conclusion of the First Circuit that the Confrontation Clause does not require a demonstration of the unavailability of the declarant, before hearsay evidence in an autopsy report may be admitted. 919 F.2d at 774-76. He reasons that *Ohio v. Roberts*, 448 U.S. 56 (1980), requires it. In the alternative he argues that an "availability" rule "would significantly enhance the truth seeking function" of the Clause. Petition at 18.

What the First Circuit held was that "Recent Supreme Court precedent indicates that while reliability continues to be a key factor in Confrontation Clause analysis of hearsay, the declarant's availability, in a case like the present, is not." 919 F.2d at 774. The court went to explain that in *United States v. Inadi*, 475 U.S. 387, 394 (1986), this Court "declared that '*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.' " *Id.* It went on to note *Inadi*'s holding that co-conspirator statements of a non-testifying declarant may be admitted without a showing of unavailability, and concluded, "We believe that *Inadi* is controlling here." *Id.*

Roberts concerned prior testimony. The rule requiring a showing of the declarant's unavailability was based on

the preference "for present, live testimony" where available. *Id.* In *Inadi*, however, it was pointed out that statements made by a coconspirator while the conspiracy was in progress "could not be replicated, even if the declarant testified to the same matters in court." *Id.* (citing 475 U.S. at 396). The First Circuit concluded that the analysis "applies equally well" to reliable out-of-court statements admissible in business records and public records. *Id.* The court reasoned that observations contemporaneously recorded at autopsy were undoubtedly superior to any later testimony a medical examiner could give at trial, when he "will probably not remember the autopsy and its results independently" and would "ordinarily be able to testify only by reference to the report." *Id.* at 775.

Review of Dr. Zirkin's Grand Jury testimony bears this out, in fact, as the First Circuit noted, 919 F.2d at 778 n.14:

> In the present case, even if Dr. Zirkin had been called as a live witness, he would most likely have been forced to base his testimony upon his own written autopsy report because of the large numbers of autopsies that medical examiners perform and because of the length of time that passed between the time of performing the autopsy and the time of trial. In Dr. Zirkin's earlier testimony before the Grand Jury in the same case, he stated, "If I may refer to my notes," and took his answers thereafter directly from the report.

Certiorari was granted in *Inadi* to "resolve the question whether the Confrontation Clause requires a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying co-conspirator, when those statements otherwise satisfy the requirements of

Federal Rules of Evidence 801 (d)(2)(E)." 106 S.Ct. at 1124. This Court concluded it did not, finding only "marginal protection" would be afforded to defendants by an "unavailability rule" when compared with the "significant practical burden" it places on the prosecution. The Court pointed out moreover that *"the defendant himself can call and cross-examine such declarants"* by exercise of his rights under the Compulsory Process Clause. 106 S.Ct. at 1129. [Emphasis added.] Thus the Court declared, "We hold today that the Confrontation Clause does not embody such a rule." *Id.*

The single factor uniformly looked to among the States and federal Circuits in deciding confrontation claims has been the reliability of the evidence at issue. It is the effort to "afford the trier of fact a satisfactory basis for evaluating the truth" that gives meaning to the right in a criminal trial, *California v. Green*, 399 U.S. 149, 161 (1970), and this rests upon reliability.

Every case petitioner relies on where an autopsy report or other scientific record or report was held inadmissible was based on a finding that the evidence in issue was somehow less than trustworthy. This was true, for example, in *Stevens v. Bordenkircher*, 746 F.2d 342 (6th Cir. 1984), where, the First Circuit court pointed out, the autopsy report "was not based on an autopsy of any kind, and it falsely created the impression that its contents reflected the coroner's independent medical conclusions based on such an autopsy. Such showings would clearly justify excluding this particular report from evidence for Confrontation Clause purposes." 919 F.2d at 779 n.16.

As the First Circuit noted, in this case, "Dr. Burns, the Deputy Chief Medical Examiner, who testified at the trial, authenticated the report and established that it was prepared under the auspices of the Medical Examiner's Office" in accord with statutory requirements and established medical procedures of the Office. Burns "described the statutory mandate of the Office of the Medical Examiner, the way in which this mandate is carried out, and the generalized procedures of the Office regarding conduct of autopsies and preparation of the reports." *Id.* at 778. As the circuit court noted, however, "It happened in this case that Dr. Burns also had personal familiarity with this autopsy, qualifying him to testify to more than just the general procedures for conducting autopsies and preparing reports." *Id.*

Had petitioner actually meant to test the conclusions of the examiners as to cause of death, as he would have this Court believe, Petition at 18, he had Dr. Burns right there on the stand. As the record shows, however, *supra*, petitioner had already sought to preclude him from testifying substantively.

It is submitted the First Circuit correctly applied the reasoning of *Inadi* in this case.

II. THE CONCLUSIONS OF THE FIRST CIRCUIT ARE NOT IN CONFLICT WITH THOSE FEW CIRCUITS AND STATES THAT HAVE RECENTLY ADDRESSED THE NARROW ISSUE.

It is not the case that the opinion of the First Circuit "conflicts with federal and state decisions" on the

reliability of autopsy and other medical or scientific reports. Petition at 20. Indeed, the overwhelming trend would seem in accord with the First Circuit. In *Robertson v. Comm.*, 211 Va. 62, 175 S.E.2d 260 (1970), for example, the Supreme Court of Virginia reviewed a state law providing that " 'Reports of investigations made by Chief Medical Examiner or his assistants . . . and the records and reports of autopsies made under the authority of this chapter shall be received as evidence in any court or other proceeding,' " *id.*, 175 S.E.2d at 262 (quoting VA. CODE § 19.1-45), and observed:

> The purpose of the statute is primarily to obviate the necessity of summoning as witnesses those physicians or technicians who, in their official capacity, are required to make pathological, bacteriological and toxicological investigations, as well as post-mortem examinations. Such a provision is not only expedient and convenient – it prevents the delay that would result if the limited number of physicians, chemists and technicians were forced to testify whenever a report made by them was offered in evidence. The admission of a laboratory report in evidence violates no constitutional right of a defendant. The right to be confronted with one's accusers and witnesses does not operate to exclude proper documentary evidence.

Id.

To the same effect are *Salzetti v. Nichols*, 744 P.2d 1362 (Utah 1987) (HLA test on blood sample to prove paternity admissible as exception to hearsay rule without testimony of technician); *State v. Mayberry*, 411 N.W.2d 677 (Iowa 1987) (medical examination report admissible pursuant to statute); *McLean v. State*, 482 A.2d 101 (Del. 1984)

(blood alcohol test admitted without chemist did not abridge right of confrontation); *Howard v. United States*, 473 A.2d 835 (D.C.App. 1984) (chemical analysis as business record bore sufficient indicia of reliability for confrontation purposes); *People v. Tenorio*, 590 P.2d 952 (Colo. 1979) (official public records admissible as exception to hearsay rule to prove truth of contents). *See also State v. Reddick*, 532 N.J. 66, 248 A.2d 425, 426 (1968) (per curiam) (autopsy report prepared and filed as required by law was correctly admitted after excising conclusions of deceased medical examiner who performed post-mortem examination; present assistant was then properly allowed to testify as to his opinion of the cause of death, based on the findings in the autopsy report).

In *State v. Russo*, 3 Conn.App. 137, 485 A.2d 1335 (1985), a doctor scheduled to testify in a New Haven trial was in Providence unable to attend until the following week; the hospital report of defendant's statements to the doctor was admitted pursuant to state law, without the doctor's testimony. In reviewing the claim that defendant was denied his right to cross-examine the witness, the intermediate appellate court held that the test for determining whether evidence such as the report "should be admitted without affording the defendant the right to confront the author is that there are 'indicia of reliability' which minimize the possibility of harm in placing the evidence before the jury." 485 A.2d at 1339. The court noted that both patient and doctor were interested in accuracy; that the doctor had no motive to falsify or misrepresent findings; and that the report itself was not prepared in anticipation of litigation. It concluded that

the evidence was "highly reliable" and that its admission therefore did not violate the right of confrontation.

The same standard is seen in the federal cases. *See Hopkinson v. Shillinger*, 866 F.2d 1185, 1201 (10th Cir. 1989) (when out-of-court victims' statements "are corroborated as extensively as here, the corroboration alone may be sufficient to guarantee that the statements were trustworthy."); *Mechler v. Procunier*, 754 F.2d 1294, 1299-1300 (5th Cir. 1985) (preliminary hearing testimony bore sufficient indicia of reliability to permit admission "in complete conformity with" the Confrontation Clause, where State went to "incredible lengths" to find sole eyewitness who was moving out of state next day; her testimony was "not totally unsupported" so the jury could "logically infer from other proof" whether her version was more likely true than the defendant's; no motive had been established for her to lie; and the setting "provided guarantees of trustworthiness" in circumstances "closely approximating" trial).

In *Reardon v. Manson*, 806 F.2d 39 (1986), the Court of Appeals for the Second Circuit reversed the judgment of the district court which cited *Ohio v. Roberts*, in holding that Dr. Charles Reading, one of three toxicologists employed in the toxicology laboratory of the Connecticut Department of Health, should not have been permitted to testify to what he was told by his chemists, unless the State first showed that the chemists themselves were unavailable to testify. *Id.* at 41. Observing that the petitioners did "not dispute the State's contention that they had the right under Connecticut law to subpoena the chemists as their own witnesses" *id.* at 42, the court declared it would be "a manifest miscarriage of justice to

overturn a conviction on the ground that the State declined to call a witness whose testimony was available to both parties." *Id.* at 43. The court went on to observe, "Of course, when the prosecution seeks to introduce a hearsay statement without producing the declarant, the confrontation clause requires a showing that the statement bears adequate indicia of reliability and trustworthiness." *Id.* It noted, "No one has questioned Dr. Reading's qualifications." *Id.* It found in addition that the assistant chemists "were relating matters of present fact, of which they had immediate personal knowledge", there "was no realistic possibility that their statements were based upon faulty recollection," and "they had no motive whatsoever to jeopardize their careers by falsifying" information. "Moreover, they were well aware that Dr. Reading himself was participating in tests, the results of which would measure the accuracy of their own." *Id.* The court concluded:

> Under such circumstances, there were adequate indicia of reliability to satisfy the demands of the confrontation clause.

Id.

Montgomery v. Fogg, 479 F.Supp. 363 (S.D.N.Y. 1979), is a case in point. Habeas corpus relief was sought in part on the basis that admission of an autopsy report at trial without testimony of those who performed the autopsy impinged upon the right of confrontation. The district court noted that official reports "are a recognized exception to the hearsay rule and have long been deemed admissible, notwithstanding the confrontation clause." *Id.* at 370. The court explained, "The rationale supporting their admissibility is that they have sufficient 'indicia of

reliability' to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' " *Id.* Autopsy reports in New York "are official records kept in the regular and usual course of the performance by the medical examiner of his official duties"; their "reliability is underscored by the rigid requirements" set by state law for medical examiners. "Indeed," the court reasoned, "if business records are admissible as an exception to the hearsay rule because they have the 'earmarks of reliability' or 'probability of trustworthiness' (citing *Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943)), then, a fortiori, public records kept pursuant to statute carry greater weight of reliability." *Id.* at 370-71.

Again, where such reports have been excluded, generally they have been found to be somehow unreliable for the truth of the matter asserted in them. *See Moon v. State*, 300 Md. 354, 478 A.2d 695 (1984) (toxicology report admitted over objection without its author required reversal where facial discrepancies in report raised doubts as to its reliability).

CONCLUSION

It is true this Court has not directly passed upon the effect of the Confrontation Clause on admission of an autopsy report in a homicide case without testimony by its author. It may be that the issue is ripe, as petitioner would urge. The Seventh Circuit recently observed in another context, "At present, . . . there is no single authoritative criterion for when the admission of hearsay evidence violates a defendant's constitutional right to

confrontation." *Nelson v. Farrey*, 874 F.2d 1222, 1227 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 835-36 (1990).

This Court had "decline[d] to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' " of hearsay evidence under the Confrontation Clause, however, *Idaho v. Wright*, ___ U.S. ___, ___, 110 S.Ct. 3139, 3150 (1990). Review last Term was denied in a similar case in which the Supreme Court of Connecticut upheld admission of an autopsy report as a business record introduced through the testimony of a pathologist not present at the autopsy. *State v. Damon*, 214 Conn. 146, 570 A.2d 700, *cert. denied*, ___ U.S. ___, 111 S.Ct. 65 (1990). In that case, citing precedent of its own and of the Second Circuit in *Reardon v. Manson*, 806 F.2d 39 (2d Cir. 1986), *cert. denied*, 481 U.S. 1020 (1987), Connecticut held:

> An autopsy report derives from well recognized, routine procedures, and records objective facts. These procedures are performed hundreds of times each year, and in light of their frequency, are so generally considered reliable that they are normally undisputed. The pathologist performing the autopsy, Shah, had no motive to falsify her findings and owed no special allegiance to the state's attorney. Shah, as a physician and state employee, has a professional duty to report the results of her work in an accurate and truthful manner. [Citing *State v. Cosgrove*, 181 Conn. 562, 575-77, 436 A.2d 33 (1980).] Like a toxicology report, an autopsy report is essentially a factual report limited to objective, physical observations. As such, it contains sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.

214 Conn. at 159-60, 570 A.2d at 707-08.

The same reasoning is found in the opinion of the First Circuit in this case. It is submitted the court's discussion represents a most thoughtful and reasoned consideration of the very factors the Court has looked to, in its other cases, for " 'hearsay marked with such trustworthiness that there is no material departure from the reason of the general rule.' " *Idaho v. Wright*, ___ U.S. at ___, 110 S.Ct. at 3150.

The First Circuit decision is sound and should be allowed to stand. The petition for certiorari should be denied.

Respectfully submitted,

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